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No. 06-562

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ATLANTIC RESEARCH CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. Respondent concedes that the Court should grant review in this case to resolve the circuit conflict over the question whether a potentially responsible party (PRP) under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, that is not eligible to bring an action for contribution under Section 113(f) of CERCLA, 42 U.S.C. 9613(f), may nevertheless bring an action against another PRP under Section 107(a), 42 U.S.C. 9607(a). Respondent contends only that, in the event the Court grants review, it should also consider, as an alternative ground for affirmance, the argument that respondent *was* eligible to bring an action for contribution against the government under Section 113(f), on the theory that, even if respondent lacked a cause of action against the government under Section 107(a), it could pursue a request for *declaratory relief* under Section 107(a) (and

thereby trigger the right to bring a claim under Section 113(f)). That argument, however, has been forfeited because respondent failed properly to preserve it below. In the district court, respondent expressly dropped its claim under Section 113(f) in the wake of this Court's decision in *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 543 U.S. 157 (2004). See Mot. for Leave to File Am. Compl. 2 (stating that, "[u]nder [*Cooper Industries*], the Section 113(f)(1) claim may no longer be maintained"). Accordingly, the district court held only that respondent did not have a cause of action under Section 107(a). Pet. App. 21a-28a. In the court of appeals, moreover, respondent did not advance this argument until its reply brief, and the court of appeals did not address it. See, *e.g.*, *Navarijo-Barrios* v. *Ashcroft*, 322 F.3d 561, 564 n.1 (8th Cir. 2003) (stating that "[i]t is well settled that we do not consider arguments raised for the first time in a reply brief"). In the event the Court grants review in this case, therefore, it need not consider respondent's alternative argument.

In any event, that argument plainly lacks merit. As the petition demonstrates (Pet. 15-23), Section 107(a) does not afford a cause of action for one PRP to sue another PRP. If that understanding of the scope of Section 107(a) is correct, it necessarily follows that a PRP cannot pursue a claim *for declaratory relief* against another PRP under Section 107(a). As even respondent concedes (Br. in Opp. 8 n.2), the Declaratory Judgment Act is purely procedural and remedial in nature, see *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950); it cannot supply a substantive cause of action where none exists. Thus, if PRPs are not within the class of parties entitled to sue for the relief afforded by Section 107(a), they cannot by sleight-of-hand overcome

that fundamental flaw by seeking declaratory relief under the same provision. See *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust for So. Cal.*, 463 U.S. 1, 27 (1983).

Even assuming *arguendo* that one PRP could request a declaration that another party was a PRP in some circumstances, therefore, such a request would not arise under Section 107(a) and thus could not constitute "[a] civil action under [Section 107(a)]" so as to trigger the right to bring suit under Section 113(f). *Franchise Tax Bd.*, 463 U.S. at 27; cf. *Cooper Industries*, 543 U.S. at 160-161 (stating question presented as "whether a private party who has not been sued under § 106 or § 107(a) may nevertheless obtain contribution under § 113(f)(1) from other liable parties"). A contrary reading of Section 113(f) would effectively render superfluous the statutory requirement that a PRP may bring a claim for contribution only "during or following" an action under Section 106 or Section 107(a), by enabling a PRP to manufacture a qualifying Section 107(a) action through the simple expedient of including a request for declaratory relief. Nothing in CERCLA, or the case law interpreting it, supports such a peculiar result.

2. This Court has before it three petitions involving the same principal question: *i.e.*, whether a potentially responsible party can pursue an action against another PRP under Section 107(a). See *E.I. du Pont de Nemours & Co.* v. *United States*, petition for cert. pending, No. 06-726 (filed Nov. 21, 2006) (*DuPont*); *UGI Utilities, Inc.* v. *Consolidated Edison Co. of New York, Inc.*, petition for cert. pending, No. 05-1323 (filed Apr. 14, 2006).[1]

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[1] In all of those cases, the courts of appeals held, as a categorical matter, that a PRP either could or could not sue another PRP under

It now appears that all three petitions will be considered together at the Court's January 19 Conference. Accordingly, because this case squarely presents all relevant aspects of the question that has divided the circuits, the petition for a writ of certiorari should be granted. The later-filed petition in *DuPont* also would be an appropriate vehicle for resolving the question presented, so the Court may wish to grant certiorari in that case as well. As explained at greater length in the government's brief in *UGI*, however, the petition in *UGI* would constitute a less suitable vehicle than either this case or *DuPont* in which to resolve the circuit conflict. First, in light of the arguments that have been advanced by the respondent in *UGI* (see 05-1323 Resp. Supp. Br. 3-9), that case now clearly presents additional (and complex) factual and legal questions concerning the precise parameters of the cause of action for contribution under another provision of CERCLA, Section 113(f)(3)(B)—questions that are not independently worthy of review and over which there is at present no disagreement among the circuits.

Section 107(a), without drawing any distinction based on whether the defendant PRP was a private party or the federal government. See Pet. App. 19a; *E.I. du Pont de Nemours & Co.* v. *United States*, 460 F.3d 515, 528-529 (3d Cir. 2006); *Consolidated Edison Co. of New York, Inc.* v. *UGI Utilities, Inc.*, 423 F.3d 90, 100 (2d Cir. 2005). There is no basis for the suggestion (05-1323 Pet. Supp. Br. 2-3) that the government's liability as a PRP under Section 107(a) could somehow be broader than that of private PRPs. To the contrary, CERCLA makes clear that the government's waiver of sovereign immunity is limited to circumstances in which private parties would also be liable under Section 107(a). See 42 U.S.C. 9620(a)(1) (providing that "[e]ach department, agency, and instrumentality of the United States * * * shall be subject to * * * this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under [Section 107]").

Additionally, *UGI* does not present the subsidiary question of whether one PRP could bring an action against another on the theory that Section 107(a) contains an implied right to contribution.[2] The petition in that case should therefore be held pending the Court's disposition of this case, even if the Court decides to grant review only in this case or in *DuPont*.

CONCLUSION

The petition for a writ of certiorari should be granted. In the event that the Court also grants the petition in *E.I. du Pont de Nemours & Co.* v. *United States*, No. 06-726, the cases should be consolidated for oral argument.

Respectfully submitted.

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[2] In *UGI*, the court of appeals considered only the question whether the specific language of Section 107(a)(1)-(4)(B) authorizes one PRP to sue another (regardless of whether that cause of action would be characterized as "express" or "implied"). See 423 F.3d at 99. The court did *not* consider whether Section 107 *more generally* contains an implied right to contribution, in the sense that the court of appeals in this case contemplated. See Pet. App. 15a-17a. Nor did the respondent in *UGI* advance any such argument in the court of appeals. See 05-1323 U.S. Br. 13.